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CRIMINAL PROCEDURE IN SCOTLAND.

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Introduction.

When the writer of this report was in England two years ago as a member of the committee sent to investigate the administration of the criminal law there, he was advised by Earl Loreburn, then Lord Chancellor, to make a study of the Scottish system. In the spring of 1912 the president of the American Institute of Criminal Law and Criminology commissioned the writer to make this study. The mission was endorsed by President Taft and the Attorney General, who provided the writer with letters of introduction. Two months were spent in attendance at the following courts in Scotland: The High Court of Justiciary at Edinburgh and on circuit at Glasgow, Aberdeen and Dumfries; the sheriff courts at Edinburgh and Glasgow; and the police courts of those cities. Many courtesies were shown the writer by the judges, lawyers and other officials, from whom he received much information regarding the procedure and practice. To Lord Dunedin, the Lord Justice-General, and Lord Kingsburgh, the Lord Justice-Clerk, the writer is particularly indebted.

Before commencing a detailed discussion of the criminal procedure it is advisable to present briefly a short sketch of the origin and historical development of Scottish law. Before the sixteenth century the laws of Scotland and England were practically identical, in each country being derived from the Anglo-Saxon and Norman inhabitants. Though the Celts formed a considerable portion of the population of Scotland, they left practically no trace in the law.

In the sixteenth century the jurisprudence of Scotland was largely changed by the introduction of Roman law, which accompanied the general revival of learning in Europe. At this time a great many of the Scottish lawyers received their training in continental universities. So strong was the Roman influence during the reign of James V. that he ordained that no man should succeed to high estate who did not understand the Civil Law. The Court of Session which was established during the reign of this king was modeled after the Parliament of Paris. The extent of the influence of the Roman law during the seventeenth century may be shown by a quotation from Sir George Mackenzie's commentary

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on the criminal law:¹ "We follow the Civil Law in judging crimes, as is clear by several Acts of Parliament, wherein the Civil Law is called the Common Law. * * * And though the Romans had some Customs or Forms peculiar to the Genius of their own Nation: Yet their Laws, in Criminal Cases, are of universal use, for crimes are the same almost everywhere." Baron Hume, the leading commentator on Scottish criminal law, whose commentaries were published in 1797, regarded the Roman influence as being less extensive than set forth by Mackenzie. Hume said the influence was greater in the civil than in the criminal department, and said further: "Our whole judicial establishment and modes of trial are utterly remote from anything that was known among the Romans." These institutions, at that time, were, however, very similar to those in France.

By the treaty of union between Scotland and England in 1706, the Scottish laws and the jurisdiction of the Scottish courts were preserved, subject to change by Parliament. With few exceptions all the changes that have been made in the criminal law have been by special acts of Parliament, applicable only to Scotland. There has been very little general legislation in criminal matters. This fact, coupled with the further one that the Scottish decisions in criminal cases are not reviewable by the House of Lords, indicates the independent character of the Scottish criminal procedure, of which independence the people of that country are very proud. Though the Scottish law in civil cases, particularly the mercantile law, has by statute and decision been brought nearer to the English law, yet there is to-day no appreciable similarity between the two systems of criminal procedure. In England there is little knowledge of the Scottish law, and in Scotland general legislation applicable to the two kingdoms is not received with favor.

Towards the development of the law there has been somewhat the same attitude in this country as in Scotland. Professor J. Dove Wilson in an article in the *Juridical Review* says the following: "But when it came to speculation and to consequent free examination in search of what was best, the attention of the Americans could not be confined to such law as they had inherited."¹½ At the present, perhaps more than

¹The following treatises on Scottish criminal law and procedure were consulted in the preparation of this report:

Mackenzie, The Laws and Customs of Scotland in Matters Criminal (1678).

Hume, Commentaries on the Law of Scotland respecting Crimes (1797).

Burnett, Criminal Law of Scotland (1811).

Alison, Principles and Practice of the Criminal Law of Scotland (1831).

Macdonald, Criminal Law of Scotland (3rd ed. 1894).

Angus, Dictionary of Crimes and Offenses (1895).

Anderson, Criminal Law of Scotland (1904).

at any former time, attention in this country is directed to the legal systems of other countries. This fact, of itself, justifies a presentation of the Scottish criminal procedure, and its administration.

COURTS AND THEIR JURISDICTION.

Criminal jurisdiction in Scotland is of two kinds—*solemn*, where the prosecution is by indictment, and the court sits with a jury; and *summary*, where the prosecution is by complaint, and the court sits without jury.

The Courts exercising original criminal jurisdiction are:

1. The *High Court of Justiciary*, exercising solemn jurisdiction only. There is no appeal from the judgments of this court.

2. The *sheriff courts*, which have both solemn and summary jurisdiction. The judgments of these courts are reviewable by the High Court of Justiciary.

3. The *justices of the peace, burgh, and police courts*, which have summary jurisdiction only. The judgments of these courts are reviewable on questions of law by the High Court of Justiciary. The decisions of the justices of the peace are subject to appeal, both on law and fact, to the quarter sessions.

1. *The High Court of Justiciary.*

The High Court of Justiciary, which is the Supreme Court for the trial of criminal causes, is composed of thirteen judges with the official title of Lords Commissioners of Justiciary. These judges also compose the Court of Session, which is the Supreme Court in civil matters. The president and vice-president of the High Court are the Lord Justice-General and the Lord Justice-Clerk respectively. The former of these is also Lord President of the Court of Session.

After the Norman conquest a great officer of state called the Justiciar had universal jurisdiction over all legal controversies, civil and criminal. By statute in 1532 during the reign of James V. jurisdiction in civil causes was taken away from the Justiciar and vested in a College of Justice or Court of Session.² Originally each Justiciar, or Lord Jus-

Renton and Brown, Criminal Procedure according to the Law of Scotland (1909).

Trotter, Summary Jurisdiction (Scotland) 1908 (1909).

¹½ "Historical Development of Scots Law," 8 Jurid. Rev. 217.

²"Because our Sovereine Lord is maist desirous to have ane permanent ordour of Justice, for the universal weill of all his Lieges: And therefore tendis to institute one College of cunning and wise men, baith of Spiritual and Temporal Estate, for doing and administration of justice in all civil actions:

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tice-General as he was later called, was commissioned directly by the Crown, but about the middle of the sixteenth century the office was granted as a hereditary right to the head of the house of Argyle. In 1628 this right was by contract resigned into the hands of the King, who thereafter generally appointed some great noble to the post.

The Justiciar was assisted by several deputies appointed by himself. As the Justiciar and his deputies were generally noblemen, often with no legal learning, they were advised by a clerk, who was a trained lawyer. This clerk prepared all the indictments and was the keeper of the records. The influence of this clerk was naturally great, and it steadily increased until in the latter part of the seventeenth century he gained a vote, and then a seat on the bench of the Justiciary Court with the title Justice-Clerk. This advance was formally recognized by an act of Parliament in 1672, which provided that the Justiciary Court should consist of the Lord Justice-General, the Justice Clerk and five of the judges of the Court of Session. The Lord Justice-General was made president of the Court, and the Justice-Clerk vice-president. During the period when the office of Lord Justice-General was held by successive noblemen the Lord Justice-Clerk was virtual head of the Justiciary Court. In 1830 the office of Lord Justice-General was united with that of the Lord President of the Court of Session,³ and in 1887 all the judges of the Court of Session were made Commissioners of Justiciary.⁴

The judges of the High Court of Justiciary are appointed by the Crown on the recommendation of the Lord Advocate. When a vacancy occurs the Lord Advocate by custom may accept the commission. This he is not likely to do unless it is the position of Lord Justice-General or Lord Justice-Clerk that is vacant. If the Lord Advocate does not accept the appointment, he often recommends the solicitor-general. In most cases the judges before appointment have had an extensive experience at the bar or on an inferior bench, or both.⁵

Upon the appointment of a new judge his commission is read by the clerk to the assembled court, after which the Lord Justice-General directs

And therefore thinkis to be chosen certaine persones maist convenient, and qualified therefore, to the number of fourteene persones, halfe Spiritual, halfe Temporal, with one President: The quhilkis persones sall be authorized in this present Parliament to sit and decide upon all actions civil and nane uthers to have vote with them, until the time the said College may be institute at mair leasure."

³11 Geo. IV and 1 Gul. IV, c. 69, s. 18.

⁴50 and 51 Vict. c. 35, s. 44.

⁵The present Lord Justice General (Lord Dunedin) was successively advocate depute, sheriff of Perthshire, solicitor general and Lord Advocate. The Lord Justice Clerk (Lord Kingsburgh) was successively sheriff of Ross, Cromarty and Sutherland, solicitor general, sheriff of Perthshire and Lord Advocate.

that he shall undergo a probation. He is directed to sit in different kinds of cases along with another judge. After a satisfactory report regarding his ability to preside in these cases, he is received as a member of the court.

The salaries of the Justiciary judges are as follows: Lord Justice-General, 5,000 pounds a year; the Lord Justice-Clerk, 4,800 pounds a year; and each of the other judges, 3,600 pounds a year.⁶

The High Court of Justiciary exercises original jurisdiction over all offenses for which the punishment may be death, penal servitude or imprisonment for more than two years.⁷ The court sits at Edinburgh and on circuit⁸ in the principal cities and towns of the Kingdom.⁹ The times for holding the various circuits are fixed by Acts of Adjournal¹⁰ passed by the court. Extra sittings may be had, if necessary, upon the requisition of the Lord Advocate. For many years it was customary in each trial at Edinburgh for three judges to sit, and on circuit for two, but now a single judge sits in all cases.

The sessions of the High Court in Edinburgh are held in the old Parliament House, described by Scott in the "Heart of Midlothian." It was formerly the custom to open the court with great ceremony, "fencing the court," but this is now abolished.

The High Court of Justiciary has a broad common law power to declare and punish new crimes, there being no rule against *ex post facto* laws. Hume says: "Our Supreme Courts have an inherent power as such competently to punish (with the exception of life and limb) every act which is obviously of a criminal nature; though it be such which in time past has never been the subject of prosecution."¹¹ Alison in his Principles says: "By the common law every new crime, as it successively arises, becomes the object of punishment provided it be in itself wrong, and hurtful to the persons or property of others."¹² The difference between the common law powers of the Scottish court and those of the

⁶Crim. Proc. (Scotland) Act, 1887 (50 and 51 Vict. c. 35), s. 45.

⁷The theoretical jurisdiction of the Court is broader. Hume says: "In point of extent, its jurisdiction in the trial of crimes may be said to be almost universal. It is hardly subject to any limitations, with respect to the magnitude of the cause of complaint; and is open alike for the trial of the highest crimes and the more venial offenses" (Vol. II, p. 31).

⁸The Act of 1887 provides that every sitting of the Justiciary Court on circuit shall be a sitting of the High Court of Justiciary. 50 and 51 Vict. c. 35, s. 44.

⁹There are three circuits: North, South and West.

¹⁰The judges of High Court of Justiciary have the power to enact rules governing the procedure in that court and inferior courts. Such enactments are called Acts of Adjournal.

¹¹Vol. I, p. 12.

¹²P. 624.

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English courts, which do not generally extend beyond the case of misdemeanors, may be well shown by the following cases. In England in 1822, the question arose whether it was rape to obtain connection with a married woman by impersonating her husband. The court held eight to four that it was not,¹³ and it required a statute to make this particular act criminal. A similar case in 1838 came before Gurney, B., in *Regina v. Saunders*¹⁴ who said to the jury: "Before the passing of a very recent statute I should have had to direct you to find a general verdict of acquittal." He further says, "although in point of law this was not a rape, I consider it one of the most abominable offenses that can be committed," yet he had no common law power to punish it. When a similar case arose in Scotland the court without hesitation pronounced the act criminal and punished the offender. In Fraser's case¹⁵ in 1847 the accused was indicted for (1) rape, (2) assault committed with intent to ravish, and (3) fraudulently and deceitfully obtaining access to and having carnal relations with a married woman. The court rejected the first two charges, but held that the third was good, and the accused was convicted and sentenced to 20 years' transportation. In a similar case¹⁶ in 1858 the Court said: "It does not amount to rape and to no other nominate offense, it is an offense *per se*."

Embezzlement, obtaining property by false pretenses, and other fraudulent dealings with property, which in England and this country are criminal only by statute, are common law crimes in Scotland, under the names of "breach of trust" and "falsehood and fraud," respectively. This common law power of the courts is said by Hume to be advantageous for the following reasons: "Because all statutes are liable to be partial and defective in their description of new offenses; and thus the transgressor finds the means of eluding the sanction, and the law itself falls into contempt. But it is also a merciful course to the offender: Because the crime being censured on its first appearance and before it has become flagrant or alarming to the community, is restrained at that season by far milder corrections, than are afterwards necessary to be applied to it, when the growing evil has come to require the passing of an express law in that behalf."¹⁷ The present Lord Justice-General said this power of the court must be exercised with a wise discretion. If the court should go too far in declaring acts hitherto lawful to be crimes, the effect of the

¹³*Rev. v. Jackson*, Russ & Ry. 487.

¹⁴8 C. & P. 226.

¹⁵Arkley 280.

¹⁶Sweenie, 3 Irv. 109.

¹⁷Vol. I, p. 12.

decision would be counteracted by the Secretary for Scotland, who on behalf of the Crown would exercise the pardoning power.

There is no appeal from a judgment or sentence of the High Court, but the court exercises appellate jurisdiction over the other courts, three judges constituting a quorum.

2. *The Sheriff Court.*

The office of sheriff was created by the King, during the early days of the Scottish monarchy, for the purpose of exercising and preserving his authority against the rival powers of the local lords. One of the most powerful of these in each county was generally persuaded to accept the appointment, which became hereditary in his family. The sheriff thus became the local representative of the King in all matters, judicial and administrative. The judicial functions were in time delegated by the hereditary sheriff to a depute who was a trained lawyer. The hereditary office was abolished by the Heritable Jurisdictions Act of 1747¹⁸ and the sheriff-depute soon became sheriff. By the Sheriff Court (Scotland) Act of 1870¹⁹ the thirty counties of Scotland were combined into fifteen sheriffdoms.

The sheriff, who is appointed for life by the Crown, on the recommendation of the Secretary for Scotland, continues to exercise both administrative and judicial functions. He is the chief official in the county and on formal occasions takes precedence of all except members of the royal family.

The qualification for the office is five years' standing as an advocate or sheriff-substitute.²⁰ With the exception of the sheriff of the Lothians and Peebles, who sits at Edinburgh, and the sheriff of Lanarkshire, who sits at Glasgow, the sheriff need not reside in his sheriffdom. He continues his practice before the High Court and Court of Session, going to the county when necessary to perform his various duties there. In the absence of the sheriff the judicial duties are performed by a sheriff-substitute, who is resident and local. He must be an advocate or law agent of five years' standing,²¹ and is not permitted to engage in any other business. Up to 1877 the sheriff-substitute was appointed and paid by the sheriff. Since then the appointment is by the Crown. The sheriff has the power of appointing certain honorary substitutes for the purpose of performing incidental and formal duties if the sheriff-substitute is com-

¹⁸20 Geo. II c. 43.

¹⁹33 and 34 Vict. c. 86.

²⁰Sheriff Court (Scotland) Act, 1907 (7 Edw. VII. c. 51), s. 12.

²¹Sheriff Court (Scotland) Act, 1907 (7 Edw. VII. c. 51), s. 12.

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pelled to be absent from the county. There are 5 sheriffs and 50 sheriff-substitutes. The sheriff at Edinburgh receives 1,800 pounds annually, and the sheriff at Glasgow 2,000 pounds. The salaries of the other sheriffs, who also practice, range from 700 pounds to 1,000 pounds.²²

The sheriff has both solemn and summary jurisdiction. In exercising the former the limit of his power to punish is imprisonment for two years. In summary cases, on convicting any person of a common law offense, he may impose a fine not exceeding twenty-five pounds, or may imprison with or without hard labor for a period not exceeding three months.²³

The sheriff has also the following power to punish :

"Where a person is charged with any offense inferring dishonest appropriation of property, or attempt thereat, aggravated by at least two previous convictions of any such offense, or where a person is charged with any offense inferring personal violence aggravated by at least two previous convictions of any such offense, he may on summary conviction by the sheriff, be sentenced to imprisonment for any period not exceeding six months with or without hard labour."²⁴

In practice most of the summary cases and many of the jury cases are tried by the sheriff-substitute. Besides the trial of cases it is the duty of the sheriff to grant warrants for apprehension and to commit for further examination or for trial where a case cannot be disposed of summarily. The arraignment of an accused on indictment and his plea thereto, whether the trial will be by the High Court or the sheriff is before the sheriff, such proceeding being known as the "first or pleading diet."

"The sheriff has a concurrent jurisdiction with every other court within his sheriffdom in regard to all offenses competent for trial in such courts."

3. *Justice of the Peace Courts.*

The office of justice of the peace was established in the reign of James V. to aid in preserving the King's peace within the counties. Formerly the justices were landed proprietors but by an act of Parliament in 1906²⁵ this qualification was abolished. No legal training is requisite for this office and no remuneration is received.

²²Sheriff Court (Scotland) Act, 1853 (16 and 17 Vict. c. 80), s. 37.

²³Summary Jurisdiction (Scotland) Act, 1908 (8 Edw. VII. c. 65), sec. 11.

²⁴Summary Jurisdiction (Scotland) Act, 1908 (8 Edw. VII. c. 65), s. 12.

²⁵Justices of the Peace Act, 1906 (5 and 6 Edw. VII. c. 16), s. 1.

Justices of the peace are appointed by the Crown and have jurisdiction at common law to try summarily petty crimes constituting a breach of the peace. They also exercise a summary jurisdiction under statutes of an administrative character pertaining to such matters as roads and licensing. In most cases two or more Justices sit. The decisions of the justices are subject to review both as to law and fact by the quarter sessions, composed of a full bench of Justices. Their decisions are also reviewable on questions of law by the High Court.

Burgh and Police Courts.

"The magistrates of every royal burgh have the care of the King's peace within their bounds; and repress, by suitable punishments, the inferior transgressors against the quiet, police, or good order of the town."²⁶ The magistrates, who are generally called "bailies," are elected by the town council from amongst their own number.²⁷

The jurisdiction of the magistrates within the burgh formerly corresponded to that of justices of the peace in the county. In 1892 a general police act for all cities in Scotland except Edinburgh, Glasgow, Aberdeen, Dundee and Greenoch (each of which cities has a special police act of its own) was passed.²⁸ By this act police courts were established in the burghs and the jurisdiction of the burgh courts was also regulated. The judges in the police court are past magistrates, i. e., they have held the office of magistrate and are still members of the town council. The magistrates and police judges are laymen and are advised on ordinary points of law by the clerk. If a question of law arises which cannot readily be settled by the clerk, an official called the legal assessor is called in. He is an advocate who has the duty *inter alia* of advising the magistrates and police judges in legal matters. The police judges rotate, each one generally serving for a period of two weeks. In Glasgow there is a permanent stipendiary magistrate, an advocate, who acts as police judge, and devotes all his time to the duties of his office. This is preferable to the system of lay magistrates. Certain confusion arises from the lack of legal knowledge on the part of such magistrates; and from the fact of the constant change in the occupants of the bench, it is impossible to have a permanent policy with reference to the conviction and punishment of the offenses coming within their jurisdiction. For instance, a particular magistrate in one of the large cities will not convict a prostitute on the charge of importuning without the testimony of the person importuned. His successor on the bench convicts on the tes-

²⁶Hume, Vol. II, 270.

²⁷Town Councils (Scotland) Act, 1900 (63 and 64 Vict. c. 49), s. 56.

²⁸Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. c. 55).

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timony of the police who observed the importuning. Since it is difficult to obtain the testimony of the person who has been importuned, the police make no arrests for this offense during the sitting of the first magistrate, but the arrests are frequent when the second presides. The punishment imposed by the different magistrates for this offense also varies considerably.

THE LEGAL PROFESSION.

There are two classes of lawyers, advocates and law agents. The advocates, as the name indicates, are those who plead before the court in the trial cases. An advocate may plead in any court in Scotland, and is the only one entitled to appear in the High Court of Justiciary and the Court of Session. The qualifications for advocates are prescribed by the Faculty of Advocates, an ancient society election to which is the only method of becoming an advocate. Candidates are required to pay a large fee and must undergo an examination conducted by a committee of the Faculty. A strict supervision is exercised over its members by the Faculty, which has the power to disbar for improper conduct. An advocate is not permitted to act directly for clients, but must be instructed by a law agent.

Law agents constitute the "client caretaking" branch of the profession. They are also entitled to plead in any of the courts except the Supreme Courts. The qualifications for law agents are fixed by acts of Parliament and various Acts of Sederunt, passed by the Court of Session; and admission as a law agent is granted only by the Court of Session upon the petition of the applicant. The court may strike a law agent from the rolls for misconduct.

There are two important societies of law agents, the Writers to the King's Signet and the Society of Solicitors in the Supreme Courts. Special qualifications and additional fees are required for membership to these societies, and the members enjoy certain privileges.

Consultations between advocates and law agents take place in the great hall of the Parliament House. Here the young barrister waits for his first brief, and here the King's Counsel is consulted by the Writer to the Signet. Robert Louis Stevenson in his "Picturesque Notes of Edinburgh," describes this hall where he for a time walked briefless. "A pair of swing doors gives admittance to a hall. * * * This is the 'Salle des Pas-Perdus' of the Scottish Bar. Here by a ferocious custom, idle youths must promenade from ten till two. From end to end, singly or in pairs, the gowns and wigs go back and forward. Through a hum of talk and footfalls, the piping tones of a Macer announce a fresh cause, and call upon the names of those concerned. Intelligent men have been

walking here daily for ten or twenty years without a rag of business or a shilling of reward. In process of time they may, perhaps, be made the Sheriff-Substitute and Fountain of Justice at Lerwick or Tobermory."

In a long corridor adjoining the hall are great rows of wooden boxes each with a metal name plate. In these boxes the advocates keep the papers of the cases they are conducting.

LEGAL AID FOR POOR PRISONERS.

For many centuries in Scotland a person accused of crime has been entitled to the benefit of legal advice in all cases, and if unable to procure such advice, it is furnished him. Even in civil cases counsel have been provided for poor persons. A statute during the reign of James I. in 1424 provided:

"And gif there bee onie pure creature, for faulte of cunning or dispenses, that cannot or may not follow his cause, the King for the love of GOD, sall ordaine the judge, before quhom the cause suld be determined, to pur-wey and get a leill and a wise Advocate, to follow sik pure creatures causes."

Legal advice is furnished indigent prisoners not only at the trial but throughout the entire proceedings. This results in considerable advantage to the prisoner and in great saving of time to the courts. In cases where resistance is hopeless, or is likely to make the accused's case worse than appears in the indictment, he is advised to plead guilty. In cases of doubt the defense is carefully prepared and presented in proper manner.

The persons who represent poor prisoners are not left to haphazard choice but are regularly chosen and appointed. Each year six members of the Faculty of Advocates are appointed to be advocates for the poor. The Writers to the Signet and the Solicitors of the Supreme Court each appoint four poor's agents. Within each sheriffdom the sheriff annually orders that the law agents shall select agents for the poor. On circuit advocates of less than three years' standing are given cases by the local poor's agent. In Edinburgh and Dundee the town councils provide public defenders to represent poor persons in the police courts.

When a poor prisoner has been advised by the poor's agent to plead not guilty, the agent prepares the defense and secures the precognitions. If the trial is in the sheriff court the agent represents the accused there. In the High Court one of the advocates for the poor conducts the defense. If the charge is a serious one the Dean of the Faculty of Advocates, on application of the advocate for the poor, will assign a senior advocate, who must serve. The extent to which the poor prisoner's rights are protected may be shown by a case on circuit where there happened

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to be no counsel in attendance. The judge ordered the local sheriff to represent the prisoner, who was charged with theft.^{28a}

METHODS OF PROSECUTIONS AND PROSECUTORS.

PRIVATE PROSECUTION.

In Scotland, as in England, the earliest form of prosecution was at the instance of the party injured. This remained the only method till the sixteenth century. In 1587 the King's Advocate was authorized by act of Parliament²⁹ to prosecute in cases where the injured party failed to act.

The first formal step in a private prosecution was the filing, with the clerk of the Justiciary Court, a bill, praying the Court to grant criminal letters, these being both the summons to the accused to appear, and the formal charge against him. After the power of the Lord Advocate increased it was necessary for the private prosecutor to seek his concurrence to the bill, which could be refused only for proper cause. If the Court was of the opinion that the bill stated a criminal offense against the accused, the criminal letters were granted. These became the basis of the prosecution, which was conducted throughout by private counsel, instructed by the private prosecutor's law agent.

From the time that the Lord Advocate became active in prosecuting the number of private prosecutions fast diminished and soon the practice fell into almost complete disuse, the theory of public prosecution becoming accepted as a fundamental principle of criminal jurisprudence. A leading writer says in 1894: "Private prosecution, except in summary cases, is now unknown in practice."³⁰ A similar statement is made in a book on criminal law published in 1904.³¹ Notwithstanding this accepted practice, a private prosecution was instituted and successfully carried through in 1908 in the much discussed case of *Coates v. Brown*. In this case the Lord Advocate refused to prosecute and refused his concurrence to the bill for criminal letters.³² The Court granted criminal let-

^{28a}Hannah, 1836, 1. Swin. 289.

²⁹Statute of James VI in 1587, c. 65, provided "That the thesaurer and advocate persew slaughters and utheris crimes, althoutht the parties be silent, or wold utherwayes privily agree." Hume is of the opinion that the King's Advocate prosecuted in trials for such crimes as treason and sedition before the above statute was passed. Hume, Vol. II, p. 130.

³⁰Macdonald on the Criminal Law (3rd ed.), 281.

³¹Anderson, Criminal Law of Scotland (2nd ed.), 249.

³²"My Lord Justice-General, Lord Justice-Clerk and Lords Commissioners of Justiciary, unto your Lordships Mean and Complain—J. & P. Coats, Limited, etc., upon David Brown, coal exporter, Glasgow, etc. *That Albeit* by the laws of this and of every other well-governed realm, *Falsehood, Fraud and Wil-*

ters and the private prosecutor was allowed to proceed independently of the Lord Advocate. The revival of private prosecution caused certain criticism, but it is believed by some that it was done to meet any exigencies that may arise in the administration of justice due to increased commercial trickery and labor agitation.

There has not been a private prosecution since the case of *Coates v. Brown*. In the early part of 1912 a prominent manufacturer of ships' compasses claimed that one of his employes had made copies of certain patterns and models for the purpose of using these in manufacturing compasses in competition with his employer. The Lord Advocate was asked to prosecute and on his refusal, a private prosecution was threatened. This was blocked, however, for the time being at least, by an action of slander instituted against the manufacturer by the accused employe.

PUBLIC PROSECUTION.

The Lord Advocate and His Assistants.

The almost universal form of prosecution in the High Court and the sheriff court with jury, is by indictment at the instance of the Lord Advocate. There is no grand jury in Scotland, the indictment being found by the Lord Advocate, who may prosecute or not entirely at his discretion. The Lord Advocate, who is one of the most important officials connected with the administration of justice, is appointed by the Crown from the Faculty of Advocates. He has a seat in Parliament, and is a member of the ministry of the day, going out with his party. In addition to his duties as public prosecutor, he performs many functions of a legislative and administrative character. He initiates and introduces in Parliament the legislation relative to criminal matters in Scotland and he appoints and controls the lesser officials of prosecution. He does not personally attend in court except in cases of very grave importance. Prosecutions in the High Court are conducted by the solicitor-general for Scotland, who in criminal matters acts as depute of the Lord Advocate, and by certain assistants called advocates-depute. These are members of the Faculty of Advocates and received their appointments from

ful Imposition is a crime of a heinous nature and severely punishable: *Yet True It Is And Of Verity* that the said David Brown is guilty of the said crime actor or art and part: In So Far As*****". It was then charged that David Brown had contracted to deliver coal of a certain quality to the petitioners, that he procured from the colliery company a certificate of the shipment of such coal which he knew to be false, and obtained money on the faith of this certificate. The Lord Advocate refused to prosecute or to grant his concurrence on the ground, not that the charge was irrelevant, but because the facts were such, that conviction was improbable.

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the Lord Advocate. They are not debarred from private practice consistent with their official duties. There are four regular and two special advocates-depute. One of the four prosecutes in Edinburgh and the other three in the different circuits. An extra depute is appointed to prosecute on the western circuit at Glasgow, where it is customary for two judges of the High Court to sit. The other special depute takes charge of certain important jury cases in the sheriff courts, the ordinary prosecutions there being conducted by the procurate-fiscal. The Lord Advocate and solicitor-general, when prosecuting in person, have the privilege of pleading inside the bar. The Lord Advocate receives a salary of 5,000 pounds a year and the solicitor-general receives 2,000 pounds. The salary of each of the regular advocates-depute is 700 pounds a year.

When the position of Lord Advocate becomes vacant, the solicitor-general, if he happens to be a member of Parliament, is usually appointed Lord Advocate. The advocates-depute have the chance of steady preferment so long as the Lord Advocate's party continues in power.

It was urged in a recent editorial in one of the Scottish legal periodicals that hereafter the appointment of the advocates-depute should not depend upon party affiliation.

The solicitor of the Lord Advocate's department is the Crown agent. He is the head of the Crown office at Edinburgh, and has charge of the records of criminal prosecutions. He is appointed by the Lord Advocate and goes out of office with him. The permanency of the Crown office is preserved by several clerks who continue office through the different governments. The highest permanent official connected with the Lord Advocate's department is the chief clerk in the Crown office.

Reports and precognitions from the procurators-fiscal are sent to the Crown office and are then submitted to Crown counsel, who decide what proceedings shall be taken. In practice Crown counsel generally consults with the Crown agent's chief clerk, who from long experience is familiar with all the points of procedure.

The Crown agent or his chief clerk acts as law agent at the trial of all criminal cases before the High Court of Justiciary at Edinburgh.

The Procurator Fiscal.

In each sheriffdom there is a prosecuting official called the procurator-fiscal. The early sheriffs established the office for the collection of the fines and forfeitures to which they were entitled. At a later period the duty of prosecuting in the sheriff court under the direction of the sheriff was delegated to the procurator-fiscal. As the power of the Lord Advocate increased the procurator-fiscal was brought under his control

and direction, and by the act of 1907³³ the power of appointing the procurator-fiscal, who is generally a law agent, was transferred from the sheriff to the Lord Advocate, whose depute he now is. A procurator-fiscal can be removed from office only by the Secretary for Scotland for inability or misbehavior, upon a report by the Lord President of the Court of Session and the Lord Justice-Clerk for the time being.³⁴ This means practically a life appointment. The procurators-fiscals at Edinburgh and Glasgow have had long and distinguished terms of service. The former, jointly with the procurator-fiscal of Fifeshire, is the author of one of the leading books on criminal procedure. A judge of the Justiciary Court, speaking of the procurator-fiscal of Glasgow, said that several of the judges of that court, when advocates-depute, were indebted to the procurator fiscal for much information and advice.

The procurator-fiscal prosecutes before the sheriff, sitting either with or without jury. Where a crime has been committed in the sheriffdom, it is the duty of the procurator-fiscal to conduct an investigation. He has the power of compelling the attendance of witnesses whom he examines privately, in an *ex parte* proceeding. His position in this respect is similar to that of the *juge d'instruction* of France. The statements of the witnesses to the procurator-fiscal are reduced to writing and are known as the precognitions. These are referred to Crown counsel, who decide whether an indictment shall be brought, and if so in what court it shall be tried. If the indictment is set for trial in the sheriff court, the procurator-fiscal prosecutes, except in rare cases of importance, where an advocate-depute takes charge of the case. When an advocate-depute prosecutes either in the High Court at Edinburgh or on circuit, or in the sheriff court the procurator-fiscal who conducted the investigation acts as law agent. The procurator-fiscal collects the fines and forfeitures in the sheriff court. It is also his duty to investigate all deaths of a sudden, accidental or suspicious character.

Prosecutions before justices of the peace are conducted by the procurator-fiscal of the justice of the peace court. They are appointed by the justices at quarter sessions.

The Burgh Prosecutor.

Prosecutions in the burgh and police courts are conducted by a burgh prosecutor. He is appointed by the Commissioners of Police,³⁵

³³Sheriff Court (Scotland) Act, 1907 (7 Edw. VII. c. 51), s. 22.

³⁴Sheriff Court (Scotland) Act, 1907 (7 Edw. VII. c. 51), s. 23.

³⁵Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. c. 55), s. 461.

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who are really the Town Council.³⁶ He is generally a law agent; in Edinburgh he is an advocate. The prosecutor is not permitted to engage in any other business. The salary varies in the different cities; the prosecutor in Glasgow receiving about \$3,500.

It lies in the power of the burgh prosecutor to decide whether he will prosecute or not, and all complaints are in his name. Unlike the procurators-fiscal in the county he is not subject to the control or direction of the Lord Advocate. In Glasgow, where there are nine police courts, the lieutenants of police act as assistants to the burgh prosecutor.

SOLEMN PROCEDURE.

Procedure on indictment is in part regulated by the Criminal Procedure Act of 1887,³⁷ of which the present Lord Justice-Clerk, when Lord Advocate, was the author, and by certain sections of the Summary Jurisdiction Act of 1908.³⁸

PROCEEDINGS PRIOR TO TRIAL.

Apprehension and Commitment.

Arrest for examination may be either with or without warrant. A warrant for arrest is issued by a magistrate upon petition, which is generally in writing but need not be under oath, unless the magistrate so requires. The petition contains a statement of the charge. Arrest does not always follow the issuing of a warrant, as it is permissible to deliver a copy of the petition and warrant to the accused and inform him of the time and place of the examination warning him that if he does not appear he will be apprehended. Certain special acts provide for citation of the accused, viz., summoning him to appear for examination.

After making an arrest the officer should warn the prisoner that anything he says regarding the charge may be used in evidence against him. Voluntary statements made by the prisoner after being thus warned are admissible in evidence. Interrogations of arrested persons by the police are forbidden and confessions and admissions obtained in this way are inadmissible in evidence. A leading author on evidence says, "Nor will it render such examinations admissible that the prisoner was told he was at liberty to decline answering, for the police authorities are not permitted to examine him without the protection of a magistrate."³⁹ In

³⁶Testimony of Lord Advocate Shaw before the Royal Police Commission, 1907, p. 1214.

³⁷50 and 51 Vict. c. 35.

³⁸8 Edw. VII. c. 65.

³⁹Dickson on Evidence, s. 347.

this way "third degree" examinations by the police are prevented. Evidently the rule was not so strict a century ago, for in a case in 1858 the Lord Justice-Clerk (Inglis) said: "I was the first who many years ago pressed on the Court the necessity of putting a stop to what had been allowed to go too far, viz., the system adopted by police-officers of questioning prisoners after apprehension."⁴⁰

After arrest the accused is taken without delay before a magistrate—in practice the sheriff-substitute—for examination. This examination is private and until 1887 the accused was not allowed to have legal advice. The accused after being informed of the charge and being warned that anything he says may be used against him and that he may decline to answer is questioned by the magistrate or by the procurator-fiscal in the magistrate's presence. His answers and any further statements made by him are written down by the clerk and are signed by the accused and the magistrate, and attested by witnesses. The statements of the accused, known as his *declaration*, were according to Alison for the "double purpose of giving him an opportunity of clearing himself in so far as he can by his own allegations, and explaining any circumstances which may appear suspicious in his conduct, and of affording evidence on which the magistrate can with safety proceed in making up his mind whether or not to commit for trial."⁴¹ At the trial the declaration is generally read to the jury by the clerk of court at the close of evidence for the prosecution.

According to the act of 1887 a person immediately after arrest is entitled to secure the services of a law agent, and to have a private interview with him before examination on declaration, at which the agent may be present.⁴² When a serious offense is charged the examining magistrate should inform the accused of his right to consult a law agent. Following are the declarations in the Monson case (1893) and the Slater case (1909):

"Judicial declaration, dated 31st August, 1893. At Inveraray, the 31st day of August, 1893. In presence of John Campbell Shairp, Esquire, advocate, Sheriff-Substitute of Argyllshire:

"Compeared a prisoner, and the charge against him having been read over and explained to him, and he having been judicially admonished, Mr. Dugald M'Lachlan, writer, Lochgilphead, and Mr. Thomas Lindsay Clark, law agent, Edinburgh, agents for the prisoner, being present, and being thereafter examined thereanent—*declares*: My name is Alfred John Monson. I am thirty-three years of age, and I am married. I have no profession, and at present reside at

⁴⁰*Lewis v. Blair*, 1858, 3 Irv. 16, 21.

⁴¹Allison's Practice, p. 131.

⁴²Sec. 17.

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Ardlamont House, Argyllshire. I have to say that I am not guilty of the charge made against me, nor was I with Mr. Hambrough, nor within sight of him, when the accident happened. Therefore I cannot explain how it happened. Under the advice of my law agent, I decline to make any further declaration at present. All which I declare to be truth."

(Signed)

Alfred John Monson.

(")

J. C. Shairp.

J. C. MacIullich,
Thos. M'Naughton,
John Campbell,
David Stewart,

} Witnesses.

"My name is Oscar Slater. I am a native of Germany, married, thirty-eight years of age, a dentist, and have no residence at present.

"I know nothing about the charge of having assaulted Marion Gilchrist and murdering her. I am innocent. All of which I declare to be truth."⁴³

The accused may refuse, if he wishes, to make a declaration, in which case he is at once committed for further examination. In practice an accused is not likely to be advised by his agent to make a declaration unless he has something to state which will tend to clear him at once of the charge.

Where the prisoner has made a declaration and the magistrate does not consider this sufficient cause for ordering the prisoner's immediate release, he examines available witnesses. This examination is private. If the magistrate is then in doubt whether there is sufficient ground for committing the accused for trial he may commit him for further examination, so as to allow a more extensive inquiry to be made. In practice never more than eight days elapse between commitment for further examination and commitment for trial. During this period the procurator-fiscal makes a complete investigation of the charge. He secures the precognitions of the witnesses and collects all articles and documents that may be used in evidence. When the accused is again brought before the magistrate, the latter considers the precognitions and if in his opinion these make out a *prima facie* case against the prisoner, he commits him for trial.

Bail.

The subject of bail is regulated entirely by statute. All crimes except murder and treason are bailable by a magistrate, and in these exceptional cases bail may be allowed by the High Court of Justiciary or the Lord Advocate. After the accused is brought before a magistrate for examination on declaration he may apply for bail, which the magistrate in

⁴³The caption and signatures are omitted.

his discretion may grant, or may refuse till the accused is committed for trial.⁴⁴ Bail is sometimes refused for the period between examination on declaration and commitment for trial for the purpose of preventing the accused from destroying incriminating evidence. During this period the procurator-fiscal is conducting his investigation into the circumstances of the crime. After the accused has been committed for trial and the opportunity has been given the public prosecutor to be heard, the magistrate may grant or refuse bail.⁴⁵ Where the magistrate refuses bail or where the applicant is dissatisfied with the amount, he may appeal to the High Court of Justiciary. The prosecutor may also appeal if dissatisfied with the granting of bail or the amount thereof.⁴⁶ According to an early statute bail was granted as matter of right in all non-capital cases, and the amount of bail was prescribed.

Prevention of Undue Delay in Prosecutions.

The Scottish law provides for no writ of habeas corpus. In lieu of this it is provided by statute⁴⁷ that where a prisoner has remained in prison for sixty days on a commitment for trial and no indictment has been served upon him, he may by notice to the Lord Advocate compel that official either to serve him with an indictment within fourteen days or to show cause before the High Court of Justiciary why the indictment was not served. If sufficient cause is not shown, the prisoner is released, but the Lord Advocate may subsequently raise an indictment against him and cause him to be arrested and recommitted. Where a prisoner on whom an indictment has been served is detained in custody for more than 80 days, then unless his trial is finally concluded within 110 days from the date of his commitment for trial, or unless such delay was due to some sufficient cause for which the prosecutor was not responsible, the prisoner is set at liberty and declared free of the charge.

Bringing of Indictment.

After the procurator-fiscal has obtained the precognitions of the witnesses, he reports these with his opinion of the case to the Crown agent, who submits them along with a record of the previous convictions of the accused to Crown counsel—in ordinary cases to an advocate depute, in serious cases to the solicitor-general or the Lord Advocate. Crown counsel, who often consults with the officials of the Crown office,

⁴⁴Crim. Proced. (Scotland) Act, 1887 (50 and 51 Vict. c. 35), s. 18.

⁴⁵Bail (Scotland) Act, 1888 (51 and 52 Vict. c. 36), s. 2.

⁴⁶Bail (Scotland) Act, 1888 (51 and 52 Vict. c. 36), s. 5.

⁴⁷Crim. Proced. (Scotland) Act, 1887 (50 and 51 Vict. c. 35), s. 43.

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decides whether an indictment shall be brought, and if so, in what court the accused shall be tried. The latter decision depends upon the seriousness of the offense, and the number and character of the previous convictions. If the punishment that may be imposed is greater than two years' imprisonment the trial must be before the High Court. In such a case Crown counsel drafts the indictment and prosecutes when it comes to trial. If Crown counsel directs that the trial shall be before the sheriff court the indictment is drafted by the procurator-fiscal who prosecutes.

Comments on Preliminary Investigation.

The proceedings up to this point present two of the most characteristic features of the Scottish procedure, viz., (1) the private character of the preliminary investigation and (2) the bringing of the indictment by the Lord Advocate at his discretion. The success of both of these depends upon the ability and integrity of the prosecuting officials. Where there is the tradition of honest administration, where the officials are paid adequate salaries, where the term of service is long, and the chances of promotion good, and particularly where there is a responsible head, the results are likely to be satisfactory, and such seems to be the case in Scotland. In discussing the Criminal Procedure Bill of 1887 Lord Advocate Macdonald said in the House of Commons:

"In carrying out any procedure whatever you cannot avoid the necessity of depending to a certain extent upon the discretion of your officials, and all you can do in cases where the discretion is abused and mistakes of a serious kind are made, is to bring public opinion and the opinion of this house to bear upon them."⁴⁸

All the prosecutors in the High Court and the sheriff court are appointed by the Lord Advocate, and are under his control. He is responsible for their official acts and may be called to account for them at any time on the floor of the House of Commons.

One of the purposes of the private examination is to prevent the facts and circumstances of the charge from becoming publicly known before the trial, so that the persons selected as jurors may be free from preconceived opinions and bias. To a great extent this result is secured. The officials, of course, do not disclose the evidence, and in comparison with the practice in this country, little newspaper investigation and discussion of the case prior to the trial. The Scottish newspapers have not, however, an absolutely clean record.^{48½}

⁴⁸316 Hansard 1377.

^{48½}In the famous Monson case in 1893, Mr. Comrie Thompson for the defense warned the jury not to be prejudiced by the statements of the newspapers prior to the trial. He said:

Indictment.

All prosecutions before the High Court and the sheriff court are by indictment in the name of the Lord Advocate. One of the most important improvements brought about by the Act of 1887 is the simplification of indictments. Before that act the indictment was a most complex and technical document. The charging part was in syllogistic form with a major proposition, that by law a certain act was punishable as a crime, and a minor proposition, that the accused committed that act, whereby he was guilty of such crime. The circumstances of the offense had to be stated with great precision. The indictment in a notorious case in 1878 was as follows:

"EUGENE MARIE CHANTRELLE, now or lately prisoner in the prison of Edinburgh, you are indicted and accused at the instance of the Right Honourable William Watson, Her Majesty's Advocate for Her Majesty's interest: That albeit, by the laws of this and every well-governed realm, murder is a crime of an heinous nature, and severely punishable; yet true it is and of verity that you, the said Eugene Marie Chantrelle, are guilty of the said crime, actor, or art and part: In so far, as on the 1st or 2nd day of January, 1878, or on one or other of the days of December immediately preceding, within the dwelling-house in or near George street, Edinburgh, then occupied by you, the said Eugene Marie Chantrelle, you did wickedly and feloniously administer to, or cause to be taken by, Elizabeth Cullen Dyer or Chantrelle, your wife, now deceased, then residing with you, in an orange, or part or parts thereof, and in lemonade, or in one or other of these articles, or in some other article of food or drink to the prosecutor unknown, or in some other manner to the prosecutor unknown, a quantity or quantities of opium or other poison to the prosecutor unknown; and the said Elizabeth Cullen Dyer or Chantrelle, having taken the said opium or other poison by you administered or caused to be taken aforesaid, did, in consequence

"But all these elements of anxiety are as nothing compared with that which I now mention to you, namely, the fact that I see the greatest difficulty, acting as conscientiously as you may, in your disabusing your minds of the prejudice which has been excited against this man at the bar during the last three or four months. I impute no motives to the newspapers. I am sure they were not actuated by any base feeling of animosity, but I cannot help saying that they have, in many instances and with great persistency, attempted to gratify the curiosity of the public at the expense of the man who was suspected of the crime. No one in this country has been able, during the period I have mentioned, to lift a newspaper in which he did not find himself face to face with paragraphs headed *The Ardlamont Mystery* or *The Monson Case*; and in every instance the statements contained in these paragraphs were highly prejudicial to the prisoner."

In July, 1912, a murder was committed in a park near Dunfermline and a young man named Anderson was charged with the offense. The witnesses to the tragedy were interviewed by newspaper reporters and their statements published. An Edinburgh paper in reporting the case started two paragraphs with the following: "Anderson's landlady, in a conversation with a *Dundee Advertiser* reporter, said. . . ."

"John Anderson, one of the park staff, gave a graphic account of the movements of Anderson to a *Dundee Courier* reporter."

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thereof, die on the said 2nd day of January, 1878, and was thus murdered by you, the said Eugene Marie Chantrelle." * * * "All which, or part thereof, being found proven by the verdict of an assize, or admitted by the judicial confession of you the said Eugene Marie Chantrelle, before the Lord Justice-General, Lord Justice-Clerk, and Lords Commissioners of Justiciary, you the said Eugene Marie Chantrelle ought to be punished with the pains of law, to deter others from committing the like crimes in all time coming.

(Signed) JAS. MUIRHEAD, A. D."

In contrast with this are the indictments in two recent murder cases;

"James Henry Hollingsworth, prisoner in the prison of Greenock, you are Indicted at the instance of the Right Honourable ALEXANDER URE, His Majesty's Advocate, and the charge against you is that, on 8th March, 1912, within the dwelling-house at 4 Watt street, Greenock, then occupied by Jamesina Hollingsworth, your wife, you did assault Malcolm Hollingsworth, your son, then residing at 4 Watt street aforesaid, and now deceased, cut his throat with a razor; and did murder him."

DAVID ANDERSON, A. D.

"Peter Donald, at present an inmate of the Royal Asylum, Aberdeen, you are Indicted at the instance of the Right Honourable ALEXANDER URE, His Majesty's Advocate, and the charge against you is that on 30th April, 1912, in the bathroom of your house, No. 65 Duthie Terrace, Aberdeen, you did drown Phyllis Donald, aged 13 months, your infant daughter, by placing her in water in the bath of said bathroom, and did murder her."

DAVID ANDERSON, A. D.

In a schedule attached to the Act of 1887 examples of indictments are given. They are all notable for their simplicity and conciseness. Following are several examples:

"You did break into the house occupied by Andrew Howe, banker's clerk, and did there steal twelve spoons, a ladle, and a candlestick."

"You did place your hand in one of the pockets of Thomas Kerr, commercial traveller, 115 Main street, Perth, and did thus attempt to steal."

"You did, while in the employment of James Pentland, accountant, in Frederick street, Edinburgh, embezzle forty pounds fifteen shillings of money."

"You did pretend to Norah Omond, residing there, that you were a collector of subscriptions for a charitable society, and did thus induce her to deliver to you one pound one shilling of money as a subscription thereto, which you appropriated to your own use."

"You did administer poison to Vincent Wontner, your son, and did murder him."

"You did ravish Harriet Cowan, millworker, of 27 Tweed Row, Peebles."

It is permitted to charge in an indictment by way of aggravation the previous conviction or convictions, in any part of the United Kingdom, of a similar or cognate offense. Thus in charging a crime inferring dishonesty, there may be added a charge that the accused was previously

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convicted of another form of dishonesty; and in charging a crime of violence any previous conviction of a violent crime may be charged.⁴⁹ For instance:

"Michael Monaghan, prisoner in the prison of Glasgow, you are Indicted at the instance of the Right Honourable ALEXANDER URE, His Majesty's Advocate, and the charge against you is that, on 26th May, 1912, in Charlotte Lane, Glasgow, you did assault John Fraser Forbes, residing at 16 Watson street, Glasgow; and did seize him by the throat, hold him against a wall, place your hand in one of his pockets, and did thus attempt to rob him; and you have been previously convicted of assault, of dishonest appropriation of property, and of attempt to appropriate property dishonestly.

GEO. MORTON, A. D."

Notwithstanding the simplicity of the indictment liberal power of amendment is given to the trial judge. A section of the act of 1908 provides that:

"It shall be competent at any time prior to the determination of the case, unless the court see just cause to the contrary, to amend the complaint or indictment by deletion, alteration, or addition, so as to cure any error or defect therein, or to meet any objections thereto, or to cure any discrepancy or variance between the complaint or indictment and the evidence. Provided that such amendment shall not change the character of the offense charged, and provided further that, if the court shall be of opinion that the accused may by such amendment be in any way prejudiced in his defense on the merits of the case, the court shall grant such remedy to the accused by adjournment or otherwise as to the court may seem just."⁵⁰

Thus the ends of justice cannot be defeated by a defect in the indictment, or a variance between the indictment and proof, and at the same time the accused is protected from surprise or prejudice.

Service of the Indictment.

For many years it has been required that a copy of the indictment with a complete list of the witnesses and the productions be served on the accused. This is greatly to his advantage, as it enables him to prepare an intelligent defense, and to investigate the character of the witnesses against him. The prosecutor at the trial is not permitted to call any witnesses against the accused of whom he has not received notice. Until recently the accused was also served with a copy of the jury list. This practice was abolished by the Act of 1887, which, however, provides that a copy shall be furnished the accused on application.⁵¹

⁴⁹Crim. Proc. (Scotland) Act, 1887 (50 and 51 Vict. c. 35), secs. 63 and 64.

⁵⁰Summary Jurisdiction (Scotland) Act, 1908 (8 Edw. VII. c. 65), s. 30.

⁵¹Crim. Proc. (Scotland) Act, 1887 (50 and 51 Vict. c. 35), s. 38.

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Pleading to Indictment.

When an accused person is served with an indictment he is also notified to make two appearances, the first for the purpose of pleading to the indictment and the second for trial. These appearances are called "diets." The first diet is always before a sheriff—the nearest sheriff to the prison, if the accused is confined; the sheriff of his domicile, if the accused has been liberated on bail. The second diet is before the court which has jurisdiction to try the offense—either the High Court or the sheriff court, as determined by Crown counsel. The first diet must be not less than six days after the service of the indictment and the second not less than nine days after the first diet. Following is the form used when the first diet is in the sheriff court, and the second diet in the High Court:

A. B., take notice that you will have to compear before the sheriff of within the Sheriff Court House at upon the day of 188.. at o'clock for the first diet, and also before the High Court of Justiciary within the Court House at on the day of 188.. at o'clock for the second diet, to answer to the indictment against you to which this notice is attached.

Served on the day of 188.. by me.

JAMES BAIRD,

Chief Warden of the Prison of Edinburgh.

JAMES HALDANE, witness.

Preliminary objections by way of abatement, for instance, that the court has not jurisdiction, that there was a defect in the service, or that the indictment is defective, must be presented at the first diet.

The last of these objections was formerly very frequent, but since the act of 1887, which simplified indictments, such objection is seldom made, except when it is claimed that the indictment fails to state a criminal charge. In case the indictment is shown to be defective the sheriff has extensive power to amend the indictment, provided that this will cure the defect. If not, the diet is adjourned, and a new indictment is served. All pleas in bar of trial, such as that the accused has already "tholed an assize" (double jeopardy) or is insane at the time, must be presented at the first diet. Special defenses such as alibi, insanity and self-defense, must be pleaded at the first diet, unless cause can be shown to the satisfaction of the trial court for the defense not having been lodged till a later date, which must in any case not be less than two clear days before the second diet.⁵² The procedure at the first diet is practically the same, whether the second diet is to be before the sheriff

⁵²Crim. Proced. (Scotland) Act, 1887 (50 and 51 Vict. c. 35), s. 36.

court or the High Court. In the latter case the proceedings at the first diet may be reviewed by the High Court at the second diet. The sheriff **may** also reserve objections for the consideration of the High Court. If the accused pleads guilty to the charge where the second diet is set for the sheriff court, the sheriff sitting at the first diet may at once sentence. If the second diet was set for the High Court, the accused who has pleaded guilty is remitted to that court for sentence.

It is possible for a person who has been committed for trial to hasten the procedure if he intends to plead guilty to the charge. He may give through his law agent written notice of his intention to the Crown agent, in which event an indictment will be served at once, citing the accused to appear at a diet not less than four days after the date of service.⁵³ If the plea is accepted by the procurator-fiscal, the sheriff will either impose sentence, or remit the accused to the High Court for sentence, according to the degree of punishment that may be imposed.

The system of two diets results in a great saving of time at the trial. Of course, if the accused pleads guilty at the first diet, there is no trial. If he pleads not guilty, all questions preliminary to the trial of the facts have been settled, and the issues are determined. As a result the jurors need be in attendance for a much shorter time than is necessary when all questions relative to service, jurisdiction and the sufficiency of the indictment must be determined at the trial.

The accused is required to provide the prosecutor with a list of his witnesses and productions at least three days before his trial, and he is not allowed to examine any witnesses nor put in evidence any productions not contained in this list. If he can show before the jury is sworn that he was unable to give the full notice of three days, the court will adjourn or postpone the trial. The chief reason for requiring the accused to plead his special defenses at the first diet, and to give notice of his witnesses is the fact, that the prosecution's case must be completed before the defense calls any witnesses. It is thus necessary for the prosecution to anticipate its rebuttal.

Qualifications of Jurors.

In criminal trials the jury is composed of five special jurors and ten common jurors. The difference between the two classes of jurors is based upon the amount of property owned. The qualifications for each class are prescribed by statute. Every man, except those expressly exempted, between the ages of twenty-one and sixty years, is eligible to

⁵³Crim. Proced. (Scotland) Act, 1887 (50 and 51 Vict. c. 35), s. 31.

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serve as a common juror who is seised in his own right or in the right of his wife of an inheritable estate within the county or town from which the jury is to come, of the yearly value of \$25 at least, or is worth in personal property the sum of \$1000 at least.⁵⁴ A special juror must either pay a land-tax in the county or town from which the jury is to be taken upon \$500 of valued rent or pay assessed taxes to the Crown on a house of the yearly rent of \$150, or own lands in Scotland of 100 pounds rent per annum, or possess personal property to the amount of 1,000 pounds.⁵⁵ A list of the persons qualified to serve as jurors is kept by the Sheriff-Clerk of the county. No exact number of jurors need be summoned for a particular sitting of a court. It is sufficient to summon "such jurors only commencing from the top of the lists of special and common jurors respectively, as may be necessary to ensure a sufficient number" for the trial. Jurors in criminal cases are not paid for their services or reimbursed for their expenses. This works considerable hardship in some cases, particularly if the jurors must come from any of the outlying islands such as the Orkneys or the Shetlands. One of the judges of the High Court was asked why the jurors are not paid, at least an amount equal to their necessary expenses. He replied that jury service is regarded as a high civic duty which payment would tend to lessen. After very long and difficult cases the jurors are generally excused, by the judge, from jury service for a term of years.

⁵⁴Jurors (Scotland) Act, 1825 (6 Geo. IV. c. 22), s. 1.

⁵⁵Jury Trials (Scotland) Act, 1815 (55 Geo. III. c. 42), s. 24.

[To be concluded in the March number.]